

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**TRUMBULL MEMORIAL HOSPITAL  
and WESTERN RESERVE PERSONNEL, INC.**

**Joint Employers**

**Case No. 8-RC-16381**

**and**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 627**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>1</sup>

The following jointly employed employees of Trumbull Memorial Hospital and Western Reserve Personnel, Inc. constitute a voting group appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time telephone operators jointly employed by Trumbull Memorial Hospital and Western Reserve Personnel, Inc. in the Trumbull Answering Service project located at the Trumbull Memorial Hospital facility in Warren, Ohio but

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<sup>1</sup> All parties including the Joint Employers and the Petitioner appeared and had the opportunity to be heard at the hearing. Trumbull Memorial Hospital and Petitioner filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

excluding all other represented employees, and professional employees, guards and supervisors as defined in the Act..

Approximately 10 employees are in the voting group found to be appropriate.

## **I. Issues**

The primary issue presented at trial is whether the telephone operators employed in the joint project known as the Trumbull Answering Service (TAS) constitute an appropriate voting group and should be included in an existing unit of business group employees currently represented by the Petitioner. The Petitioner contends that these employees are jointly employed by Trumbull Memorial Hospital (TMH) and Western Reserve Personnel, Inc. (WRP) at the Trumbull Hospital facility.<sup>2</sup> It further maintains that the employees in this group have a community of interest with those in the existing unit. The position of the TMH and WRP is that they are not joint employers. In addition, they take the position that the only appropriate unit for the employees in the group is within a unit of all of the employees of WRP. They thus deny that there is any community of interest between the employees in the group and those in the existing TMH unit.

## **II. Decision Summary**

The Petitioner seeks to have the telephone operators in the TAS group included in the unit of business office employees it already represents. I find that the telephone operators in the TAS group are jointly employed by TMH and WRP. I also find that they share a community of interest with the employees in the TMH business office employees unit. As a result, the TAS telephone operators constitute an appropriate voting group. Accordingly, I direct an election to determine whether the employees in the voting group are to be included in the current business

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<sup>2</sup> In the alternative, the Petitioner argues that since WRP does nothing more than act as a referral and payroll service, the TAS employees are in fact employees of TMH.

office employees unit. If a majority of the employees in the voting group vote for the Petitioner, they will be taken to have indicated their desire to constitute part of the existing business office employees unit represented by the Petitioner and I shall issue a Certification to that effect.

### **III. The Joint Employer Issue**

Before the petitioned-for employees can be found to be an appropriate voting group, it must be determined whether they are jointly employed by WRP and TMH. If they are solely employed by WRP, then they cannot appropriately be included in a bargaining unit of employees solely employed by TMH. However, if they are jointly employed, their inclusion in the existing TMH unit would be appropriate assuming they share a community of interest with unit employees. **M.B. Sturgis, Inc., 331 NLRB 1298 (2000).**<sup>3</sup>

#### **A. Facts**

TMH is an Ohio corporation operating an acute care facility in Warren, Ohio. It is a fully owned subsidiary of Forum Health. WRP is an Ohio corporation providing services to corporations such as TMH. It has an office and place of business in Cortland, Ohio.

The Petitioner and TMH are parties to a collective bargaining agreement in which TMH recognizes the Petitioner as the representative for its business clerical employees including those who work in information technology, accounting and as telephone operators.

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<sup>3</sup> In its brief, TMH has misread the holding of **Sturgis** by claiming that the latter case still requires the consent of both joint employers before their employees can be joined in a common unit. The Board in **Sturgis** did indeed retain the consent requirement for “multi-employer bargaining among separate and independent employers.” However, at the same time, it eliminated the consent requirement for units that “combine jointly employed and solely employed employees of a single user employer.” The instant case does not involve multi-employer bargaining but rather concerns a request for jointly employed employees of a supplier employer (WRP) to be joined into an existing unit of solely employed employees of the user employer (TMH). Thus, consent is not an issue in this case.

The record shows that the TAS was created by TMH in 1989 as an answering service for its doctors.<sup>4</sup> TAS has never been the employer of the employees who work in the project. At the outset, TAS was staffed by TMH employees employed through Home Healthcare, a division of TMH. Sometime thereafter, TMH decided to staff TAS with employees employed by WRP. According to Karen Brooks, the Administrator of the TAS project, there is no written contract between TMH and WRP with respect to the staffing of TAS.

TAS is physically located at TMH in the business group area. The TAS employees work in a room that is adjacent to and connected by an open portal with that used by bargaining unit telephone operators directly employed by TMH. In carrying out their duties, TAS employees use computer hardware made by StarTel that is both owned and maintained by TMH. TMH-employed telephone operators also regularly use this equipment. Brooks' office is located in the same suite of rooms.

In performing their daily duties, TAS employees are directly supervised by Karen Brooks. The latter's current job title, bestowed on her as of January 1, 2002, is Voice Communications Administrator for Forum Health. Brooks testified that she previously was an employee of TMH and that her job duties did not change when she was given her current position. Throughout, she has been the Administrator of TAS. Until about two years ago she also was the direct supervisor of the telephone operators solely employed by TMH. Brooks still maintains responsibility over them in her capacity as Voice Communications Administrator for Forum Health.

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<sup>4</sup> TMH doctors continue to make up the majority of clients who use the answering service provided by TAS. However, in its drive to become profitable, TAS has enlisted other clients including doctors employed at other hospitals, outside medical professionals, a courier service and a construction company.

As the Administrator of TAS, Brooks' job description includes a number of important functions. She testified that she assures that the TAS employees do their jobs properly. Brooks also verifies time sheets completed by TAS employees and assures that they have worked the hours noted therein. She makes out the work schedules for TAS employees. In addition, Brooks acts as a liaison between the TAS employees and the doctors and clients they serve. Finally, as noted above, she is responsible for maintaining the equipment used by TAS employees.

Brooks estimated that she spends about five hours per week administering the work of TAS. She acknowledged that she is the only person on-site who supervises the work of TAS employees. Sharon Love-Hladio, the President of WRP, testified that she only spends about three to four hours per week working on the TAS account. When Brooks is not administering TAS she is responsible, in her current position, for all of the other phone systems throughout Forum Health. Her direct supervisor is Tim Rowe, a manager with Forum Health.

In her testimony Brooks acknowledged that she is the author of the policy manual distributed to and used by TAS employees. This policy manual sets forth the terms and conditions of employment applied to TAS employees. Brooks noted that she developed this manual over a period of years. Some, but not all, of the provisions are patterned after similar policies contained in the policy manual applied to TMH employees. There is no separate manual applied by WRP to TAS employees.

Individuals interested in working for TAS must first make application with and be referred by WRP. They are not hired, however, until after they have been interviewed by Karen Brooks and she approves them for employment. Once employees have been hired into TAS, Brooks can also effectively discharge them. She ordered that at least one employee, Annette

Fischer, be terminated from TAS.<sup>5</sup> The President of WRP, Sharon Love-Hladio, testified that she has never terminated a TAS employee. Brooks also decided that TMH operator Nicole Manna would not be permitted to return to a previously held position at TAS.<sup>6</sup>

Brooks also disciplines TAS employees. Since she is the only person who actively monitors the daily work of TAS employees, Brooks is in the best position to correct poor job performance. She testified that when she observes employees engaged in minor infractions, she takes corrective action, usually by talking with them.<sup>7</sup> According to Brooks, she refers all serious disciplinary problems to Love-Hladio. However, the record reveals only a single, very recent case in which such a referral took place. Love-Hladio stated that she has been involved in disciplining only one TAS employee, Annette Fischer, a case she that admitted was actually handled by Brooks.

Evidence also demonstrates that Brooks is instrumental in setting the rate of pay received by TAS employees. She has routinely initiated discussions concerning raises to be received by them. In 2001, she effectively recommended to TMH management a pay increase for TAS employees. Most recently, TAS employees requested a raise from Brooks and she again recommended it to her superior, Rowe. Love-Hladio, for her part, admitted that she plays a limited role with respect to setting wage rates. She stated that she does not care what wages rates

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<sup>5</sup> The record indicates that termination from TAS does not necessarily mean discharge from WRP.

<sup>6</sup> This decision was made after consultation with Rowe, Forum Health Human Resources Director Diane Vennis and Forum Health Attorney Jon Steen. There was no apparent consultation with WRP.

<sup>7</sup> TAS employees Heather Harris and Susan Gallagher both testified that Brooks verbally warned them about performance problems and that they received no input from WRP concerning these issues.

are paid to her employees. She merely bills the client for those wages and adds a certain percentage for WRP.<sup>8</sup>

Aside from her role in the wage-setting process, Brooks also plays the lead in other key aspects of the daily lives of the employees in the project. She collects and verifies employee time sheets and keeps an attendance book. Brooks provides the orientation given to new employees entering the project. When policy issues arise, it is Brooks who issues memoranda to the employees.<sup>9</sup> In addition, Brooks is responsible for handling any complaints from clients about the service provided by TAS employees.<sup>10</sup> She also creates the work schedule.

In contrast, WRP has little if any daily involvement with TAS employees. The record indicates that once TAS employees are hired, there is minimal contact. After receiving the TAS time sheets from Brooks, WRP sends a weekly invoice to TMH that does not break out the cost of each employee but only deals in aggregate amounts.<sup>11</sup> Aside from distributing paychecks, WRP has no other involvement except when Brooks refers a serious discipline problem, an event the record indicates occurs only rarely.

## **B. Analysis**

In order to establish that two or more employers are joint employers it must be shown that the entities share or codetermine matters governing essential terms and conditions of employment. **NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3<sup>rd</sup> Cir. 1982);**

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<sup>8</sup> Indeed, Love-Hladio noted that because of the percentage she charges, the higher the wage paid by the client, the more WRP earns.

<sup>9</sup> The record includes memoranda from Brooks to the TAS employees concerning such issues as reporting off policy, client complaints, and the manner of distributing paychecks.

<sup>10</sup> Brooks testified that she is also responsible for marketing the services of TAS.

<sup>11</sup> Most of the detailed payroll work is done by Brooks who sends a weekly “exception” sheet to WRP breaking out the amount of overtime, double time, shift differential, vacation and holiday pay. Brooks noted that she is able to perform this function because she knows the rate of pay of each TAS employee.

**Riverdale Nursing Home, 317 NLRB 881, 882 (1995).** The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. **Riverdale, 317 NLRB at 882, citing TLI, Inc., 271 NLRB 798 (1984).**

The employees employed in the TAS project are hired by and on the payroll of WRP. Nearly all of their daily terms and conditions of employment, however, are determined by Karen Brooks, an official of Forum Health on behalf of its subsidiary, TMH. The factual discussion above demonstrates that Brooks has the authority to effectively hire and fire individuals employed in the TAS project. She can veto any applicant sent by WRP and, unlike Love-Hladio, has fired an employee from TAS. Furthermore, Brooks is the only on-site supervisor for the TAS project and thus the sole person who directs and assesses their work performance. She is thus in the best position to counsel and, if necessary, to discipline employees and she is the primary person to exercise this function. In addition, Brooks and her supervisor, Rowe, effectively determine the wages paid to TAS employees.

The record therefore fully supports a finding that TMH, primarily through Karen Brooks, sufficiently exercises control over the terms and conditions of employment of TAS project employees to establish TMH as a joint employer of those employees. Having decided that the TAS employees are jointly employed by WRP and TMH, a prerequisite has been met for determining whether they form an appropriate voting group.

#### **IV. Community of Interest**<sup>12</sup>

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<sup>12</sup> TMH takes the position that the petition seeks a distinct and new unit combining TAS employees and the operators employed by TMH. The record makes clear, however, the Petitioner's intent is to combine the TAS employees into the existing unit of business office clerical employees, a unit that is appropriate within the standards set forth by the Board's rule concerning bargaining units in acute care hospitals.



When, as in this case, an incumbent union seeks to add a group of previously unrepresented employees to an existing unit, and no other labor organization is involved, the Board conducts a self-determination election. In such an election, if a majority of the employees vote against representation, they are considered to have indicated a desire to remain unrepresented. However, if a majority vote for the petitioner, they are deemed to have indicated their desire to become part of the existing unit represented by the incumbent union. The Board has held that, before such an election can be held, it is necessary to determine whether the employees sought to be included in the existing unit constitute an identifiable, distinct segment so as to establish an appropriate voting group and if they share a community of interest with unit employees. **Warner Lambert Co., 298 NLRB 993, 995 (1990)**. The record leaves no doubt that the TAS project employees constitute an identifiable, distinct group. The question remains, however, whether they share a community of interest with existing unit employees.

#### **A. Facts**

Some key facts bearing on community of interest have been identified in the discussion above. Thus, for example, Karen Brooks acts as the first-line supervisor for TAS employees and also is responsible for the telephone operators in the bargaining unit. While she no longer directly supervises the latter group, Brooks maintains oversight. Brooks developed the policy manual applied to TAS employees and incorporated provisions of the manual used by unit employees. Given these facts, the record establishes that the TAS employees share a significant degree of common supervision with unit employees and are subject to many of the same personnel policies.<sup>13</sup>

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<sup>13</sup> For example, TAS employees are required to sign the same confidentiality agreement signed by TMH employees.

The job descriptions of these two groups of employees are different but the types of tasks they perform are similar and there is some overlap in responsibilities. Since TAS is an answering service, the primary job duty is to take telephone messages for clients, type them into a computer and then deliver them by any number of methods including page, fax, or phone call. TMH telephone operators field calls from the general public and extend those calls within the Hospital to the person sought. Thus, they likewise answer the phone but do not necessarily take messages.

As noted above, TAS employees physically work in a room at TMH that is adjacent to the area where unit telephone operators<sup>14</sup> are located. With only an open portal separating the two rooms, it is apparent that they work in close proximity and have contact with each other. Record evidence of some overlapping duties reinforces this impression. Brooks testified that one of the StarTel terminals used for TAS purposes is actually located in the room used by TMH operators. Thus, TMH operators have the equipment and ability to take TAS calls.

Indeed, the record indicates that TMH operators regularly perform the work of TAS employees. Brooks testified that, on a daily basis, the TMH midnight operator handles all TAS calls that come in from 1:00 a.m. to 5:00 a.m. Moreover, the TAS personnel manual includes a policy that provides for the temporary transfer of TMH operators, also employed as TAS employees, to TAS duties. These facts demonstrate that a certain degree of interchange occurs and that TMH considers the work of TMH operators and TAS employees to be somewhat interchangeable.

The record shows that there is in fact one employee, Susan Gallagher, who is employed simultaneously as a TMH telephone operator and as a TAS employee. She has worked for TAS

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<sup>14</sup> Brooks maintained that unlike unit employees who are truly telephone operators, the TAS employees are actually “secretaries.” The record shows that both of these groups are primarily engaged in answering the telephone.

off and on since about the time TAS was created. Gallagher is exempted from TMH's current policy against employees working for both TMH and TAS.

With respect to longevity, the record shows that three or four other TAS employees have been employed at TAS for at least one year. This belies TMH's argument that TAS employees are only temporaries who quickly come and go. There is no evidence that their employment at TMH is any shorter than that of TMH employees. TAS employee Heather Harris testified that upon being hired, she was told by Debbie Capatch, personnel consultant for WRP, that her employment at TAS was permanent. Moreover, the record fails to show that WRP, absent a request from an individual employee, reassigns TAS employees to other user employers.

Evidence also demonstrates that TAS employees are treated like TMH employees with respect to other conditions of employment. They are always on-call and therefore wear TMH issued pagers. They also wear the same type of identification badges worn by TMH employees. Although their benefit plans are different, TAS employees are granted free parking at the Hospital and enjoy the same cafeteria discount as TMH employees.

## **B. Analysis**

The facts establish that the employees in the petitioned-for voting group share a strong community of interest with the telephone operators in the existing unit with respect to a number of key factors. Most salient is their common supervision. Karen Brooks is the key supervisor with respect to both groups of employees. She is the instrumental person in setting and implementing the terms and conditions of employment for TAS employees and the TMH telephone operators. As a result, TAS employees are subject to many of the same policies as the TMH operators.

A second key factor is that both groups of employees perform the same type of work. They essentially answer the telephone and take appropriate action. TMH argues that they are distinguished in that TAS employees take messages and record them on a computer while TMH operators do not normally take messages. This distinction, however, is a minor one and further diminished by the fact that TMH operators are trained to use the TAS computer equipment and, at least during the night hours, operate it.

This similarity of job skills allows for a degree of interchangeability. Thus, a TMH operator routinely takes TAS calls after 1:00 a.m. Also, presumably, TMH operators can fill-in for TAS employees if necessary and vice-versa. This interchangeability is feasible because these two groups of employees work in close proximity in adjacent rooms at the Hospital. Only an open portal separates them.

In arguing against a community of interest, TMH stresses that these employees receive dissimilar wages and benefits. While that may be the case, such factors are totally within the control of the employers. They are not alone sufficient to outweigh the substantial factors listed above that show a close community of interest between the TAS employees and the TMH operators.

The Board has held in Sturgis that jointly employed employees of a supplier employer, regardless of whether they are considered temporaries, may appropriately be included in the same bargaining unit with the solely employed employees of a user employer if they share a community of interest. I find, based on the factors enumerated above that the employees of WRP jointly employed by TMH in its TAS project share a community of interest with employees in the existing bargaining unit of business clerical employees. Accordingly, I find that they

constitute an appropriate voting group sufficient to warrant their inclusion in the business clerical unit currently represented by the Petitioner.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 627**. If a majority of employees in the voting group vote for the Petitioner, they will be taken to have indicated their desire to constitute part of the existing business office unit represented by the Petitioner and I shall issue a certificate of results to that effect.

### **LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by Tuesday, June 11th, 2002.

Dated at Cleveland, Ohio this 28th day of May 2002.

/s/ Frederick J. Calatrello

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Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8

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177-1650

